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No. 481.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN OF SING SING PRISON, APPELLANT,

v.

CHARLES C. BROWNE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

ADDISON JOHNSON, AGENT AND WARDEN of Sing Sing Prison, appellant,
v.
CHARLES C. BROWNE.

No. 481.

BRIEF FOR APPELLANT.

This is a habeas corpus proceeding arising out of a criminal case and involves a most important question relating to the law of extradition—one which has never heretofore been passed upon by this court.

STATEMENT.

In the spring of 1902 it was disclosed by investigation that extensive frauds had been practiced at the port of New York in the importation and entry of Japanese silks. The parties implicated were an importing firm known as A. S. Rosenthal & Co. and an examiner of silks in the appraiser's department at the port of New York named Charles C.

Browne, the appellee here. The frauds consisted of the presentation for customs purposes of invoices made out in Japan, wherein the weight of the silks was falsely and fraudulently understated, and the certification by Browne (whose duty it was to examine and report as to the correctness of the invoices by comparing them with the goods themselves sent to the public stores for examination by him) that these false and fraudulent invoices were correct.

In the spring of 1903 the grand jury of the United States Circuit Court for the Southern District of New York filed two indictments against the respondent Browne. In one of these, under section 5440, Revised Statutes, he was jointly indicted with the two importers, A. S. Rosenthal and Martin L. Cohn (composing the firm of A. S. Rosenthal & Co.), for conspiring to defraud the United States. In the other indictment Browne alone was charged, under section 5444 of the Revised Statutes, with knowingly aiding in attempting to enter Japanese silks upon payment of less than the amount of duty legally due thereon.

In January, 1904, the conspiracy indictment was brought to trial. The defendant Rosenthal had absconded and did not appear, and is now a fugitive from justice. The trial proceeded against the other two defendants, and Browne was found guilty and was sentenced to two years at hard labor in Sing Sing Prison.

An appeal was prosecuted on behalf of Browne

to the United States Circuit Court of Appeals where his conviction was affirmed. An application was thereupon made to this court for a writ of certiorari, which, on the 15th day of January, 1906, was denied. Four days later, on the 19th of January, 1906, Browne was called in the Circuit Court to submit himself for the execution of the sentence, and failed to respond. A few days later it was discovered he had fled to Canada.

The Government instituted proceedings in Montreal to have Browne extradited under subdv. 4, art. 1, of the extradition treaty between the United States and Canada, which provides for fraud committed by an agent as one of the grounds of extradition. After various hearings the extradition commissioner held Browne for extradition, but on a writ of habeas corpus the Court of Kings Bench decided that the crime of conspiring to defraud, of which he had been convicted, was not fraud within the meaning of the section of the treaty above referred to, and ordered his discharge.

The United States Government immediately caused the rearrest of Browne on a new complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes in 1903, and for which offenses he had not been tried in New York. This second proceeding resulted in his being held for extradition by the commissioner, and upon writ of habeas corpus the Court of Kings Bench decided that a case for extradition had been made out,

and ordered his surrender to the United States authorities.

Browne was brought from Montreal by an officer of the United States deputed for that purpose, and when the train on which he was a passenger arrived within the Southern District of New York he was surrendered by the officer who had brought him to the marshal of the United States for the Southern District of New York, the proper custodian for his reception. The said marshal having in his hands the unexecuted process of the United States Circuit Court for the Southern District of New York, by which Browne had been ordered to serve a term of two years in Sing Sing Prison, proceeded to deliver him into the custody of the warden of Sing Sing Prison. Browne thereupon sued out a writ of habeas corpus in the United States Circuit Court for the Southern District of New York, claiming that his imprisonment for a crime of which he had been convicted before his flight, and a different crime from that upon which his extradition had been ordered, was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. Upon the return day named in the writ the warden of Sing Sing Prison made return to the writ, setting forth that he held Browne under an order of the United States Circuit Court for the Southern District of New York, sentencing him to serve a term of two years at hard labor at Sing Sing Prison. The facts in the case were in no wise

disputed. After hearing argument, Judge Hough, United States District Judge sitting in the Circuit Court, decided that Browne's imprisonment was illegal and in violation of the terms of the extradition treaty and directed his release. An order to that effect was entered, and from that order the present appeal is prosecuted by the United States.

TREATY PROVISIONS TO BE CONSIDERED.

The following provisions of the extradition convention between the United States and Great Britain, concluded July 12, 1889, proclaimed March 25, 1890 (26 Stat., 1508), will require the construction of the court:

> ART. 2 (par. 2). No person surrendered by either of the High Contracting Parties to the other *shall be triable or tried*, OR BE PUNISHED for any political crime or offense, or for any act connected therewith, committed previously to his extradition.
>
> ART. 3. No person surrendered by or to either of the High Contracting Parties shall *be triable or be tried* for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.
>
> ART. 7. The provisions * * * of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

PRECISE QUESTION INVOLVED.

The question to be determined by the court is whether there is anything in the treaty provisions above cited, or in the decisions of this court, which permits or requires that a person duly convicted in the courts of the United States of a nonpolitical offense, and sentenced to imprisonment therefor before his flight, shall be allowed to go at large within the United States and within the district in which he was sentenced because he has been extradited from Great Britain or Canada for another offense for which he has not yet been tried, and whether a court of the United States is prevented from enforcing its judgment of imprisonment against such person for an offense of which he was duly convicted.

The learned judge in the court below based his action discharging the respondent on a ruling that the action of the Government in this case was in conflict with the decision of this court in the case of *United States* vs. *Rauscher* (119 U. S., 407).

The Government submits with confidence the following propositions upon which it relies, and upon which it predicates its contention that the action of the lower court in discharging the respondent was erroneous and should be reversed:

1. That there is nothing in either Article III or Article VII of the Blaine-Pauncefote Treaty of July 12, 1889, which protects the respondent from imprisonment under a sentence imposed before his flight.

2. That the language of Article III of the Treaty of 1889, considered in connection with that of Article II of the same treaty, repels any inference that it was the true intent and meaning of Article III to forbid the punishment of any person extradited under the terms of the treaty for an offense of which he had been convicted and upon which he had been sentenced before his flight.

3. That the language of Article III of the treaty, when compared with that of provisions in other treaties of the United States adopted both prior and subsequent to the adoption of the treaty in question, plainly shows that the construction contended for by the respondent is untenable.

4. That the fact that an application had been made by the United States to the Canadian government for the extradition of respondent on a charge upon which he had been convicted and sentenced, and that said application had been refused, does not in any way destroy the right of the Circuit Court of the United States to enforce the execution of its sentence after the extradition of respondent on another charge.

5. That there is nothing in the decision of this court, in the case of *United States* v. *Rauscher* (119 U. S., 407) which prevents the imprisonment of respondent under the sentence imposed upon him before his flight.

ARGUMENT.

I.

THERE IS NOTHING IN EITHER ARTICLE III OR ARTICLE VII OF THE BLAINE-PAUNCEFOTE TREATY OF JULY 12, 1889, WHICH PROTECTS THE RESPONDENT FROM IMPRISONMENT UNDER A SENTENCE IMPOSED BEFORE HIS FLIGHT.

So far as Article VII of the treaty is concerned, it certainly requires no extended discussion. It must be read and considered in the light of the second recital of the preamble, which is as follows:

> And whereas it is now desired by the High Contracting Parties that the provisions of the said article [Article 10 of the Ashburton Treaty of 1882] should embrace certain crimes not therein specified, *and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention.*

It is entirely clear that the sole purpose of paragraph 1 of Article VII was to prevent any claim being interposed on behalf of a fugitive *convict* that the provisions of the treaties of 1842 and 1889 applied only to untried criminals, and not to those who had been tried and convicted.

Coming now to Article III, we find it to provide that—

> No person surrendered by or to either of the High Contracting Parties *shall be triable or be tried* for any crime or offense, committed prior to his extradition, other than

> the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered.

This language is plain, unambiguous, and unequivocal. It leaves no room for construction. Neither in a contract nor in a statute could these words be stretched so as to include punishment. The word "tried" has a plain meaning, everywhere understood, and as to which there can be no mistake or confusion. It certainly does not imply or include punishment. Until a party has been tried it can not be determined whether he is to suffer any punishment. He may be acquitted, or after conviction sentence may be suspended, or he may be immediately pardoned, in none of which cases would he suffer any punishment. The object of inserting the word "triable" is obviously to protect the person extradited from being arrested and kept in custody or held in bail awaiting trial. It was obviously intended to give the party extradited a right to raise the question of the illegality of his arrest without having to wait until the prosecuting officer got ready to try him, and compel him to put in his plea for the first time at the beginning of the trial.

The language of this provision, it is insisted, leaves no room for construction. It is sometimes suggested that statutes may require construction even where their language is plain and unequivocal, to prevent such an application of the statute as,

while it may be consistent with the plain meaning of the words, is plainly opposed to the spirit and intent of the legislation. This doctrine, sometimes applied by the judicial branch of the Government, is based upon the well-known fact that statutes are often hastily prepared, frequently amended in the hurry of legislative proceedings, considered by the Executive when a great mass of other bills awaiting action prevents careful deliberation, whereby a statute may sometimes say precisely the opposite of what it means. But this doctrine can have no application to solemn treaties, because the grounds upon which it is predicated have no existence in the case of treaties. Treaties are prepared with care, formality, and the utmost deliberation. They are the product of extended and careful negotiations. Their language is drafted, amended, and polished to the point of utmost nicety of expression by trained diplomats, skilled in the utmost refinements of verbal discrimination. This particular treaty was negotiated by the late Secretary of State, Mr. James G. Blaine, and the former British Ambassador, Sir Julian Pauncefote. It would be a strange assumption that two such men as these did not say exactly what they meant to say—no more and no less.

Not only has the language of such a treaty to receive the approval of trained diplomats, after careful deliberation, but in this country it has to run the gauntlet of deliberate consideration and discussion in the Senate of the United States.

It is further to be noted that on the 13th of January, 1902 (see compilation of treaties in force 1904, p. 377), thirteen years after the adoption of the treaty now under consideration, it was amended by a supplementary treaty prepared by the late Secretary Hay (a man also of high literary distinction) and Sir Julian Pauncefote. If any errors had been discovered in the text of the treaty, they might then have been corrected; and this court is now asked to do what the framers of the supplementary treaty found no occasion for doing.

Several of our extradition treaties provide that no person shall be tried for any offense other than that for which he was extradited, unless the offense for which it is proposed to try him be one denounced in the extradition treaty. It is respectfully submitted that the court would have as much right to interpolate this provision into Article III as it has to interpolate there the word "punished."

The necessity and propriety of adhering to the plain language of treaties has been fully recognized by this court. In the case of *The Amiable Isabella*, (6 Wheaton, 1, 71), this court said (per Story, J.):

> In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another Department of the Government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on

> our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Again in the case of *Society, &c.*, v. *New Haven* (8 Wheaton, 464, 490), this court said (per Washington, J.):

> The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed that there shall be no future confiscations, in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed?

Again in the case of *Tucker* v. *Alexandroff*, (183 U. S., 424, 436), this court said (per Brown, J.):

> But whatever view might be taken of the question of delivering over foreign seamen in the absence of a treaty, we are of opinion that the treaty with Russia, having con tained a convention upon this subject, that convention must alone be looked to in determining the rights of the Russian authorities to the reclamation of the relator. Where the signatory powers have themselves fixed the terms upon which deserting seamen shall be surrendered, we have no right to enlarge those powers upon the principles of comity so as to embrace cases not contemplated by the treaty. Upon general principles applicable to the construction of written instruments, the enumeration of certain powers with respect to a particular subject-matter is a negation of all other analogous powers with respect to the same subject-matter. (*Ex parte McCardle*, 7 Wall., 506; Endlich on Stats., secs. 397, 400.) As observed by Lord Denham in *Aspdin* v. *Austin* (5 Ad. & El. (N. S.), 671, 684), "where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." The rule is curtly stated

in the familiar legal maxim, *expressio unius est exclusio alterius*.

II.

THE LANGUAGE OF ARTICLE III OF THE TREATY OF 1889, CONSIDERED IN CONNECTION WITH THAT OF ARTICLE II OF THE SAME TREATY, REPELS ANY INFERENCE THAT IT WAS THE TRUE INTENT AND MEANING OF ARTICLE III TO FORBID THE PUNISHMENT OF ANY PERSON EXTRADITED UNDER THE TERMS OF THE TREATY FOR AN OFFENSE OF WHICH HE HAD BEEN CONVICTED AND UPON WHICH HE HAD BEEN SENTENCED BEFORE HIS FLIGHT.

Article II of the treaty provides as follows (par. 2):

> No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, *or be punished* for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

It will be observed that in this article there is added to the words "triable or tried" found in the third article the words "or be punished." *If these words were found in Article III this case would never have arisen.* The contention on the other side is that, although the framers of this treaty inserted these words in the article referring to political offenses and omitted them from the article providing for other than political offenses, the court is to read them into the third article the same as though

they had been expressly inserted. Upon what theory of statutory or treaty construction this can be done we are at a loss to conceive. The use of these words plainly indicated that the punishment of those charged with offenses after their conviction was in the minds of the parties to this agreement, and that they deliberately elected to forbid it as to political offenses and to refrain from forbidding it as to other offenses.

Further light is thrown on this matter by the first paragraph of Article II of the treaty, which is as follows:

> A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, *or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.*

It will be seen that the framers of the treaty not only forbid the trial or punishment of a person extradited under the treaty for any political crime or offense or for any act connected therewith, committed previously to his extradition, but that they went so far as to provide that if the offense for which his surrender was demanded was a nonpolitical offense, but that he could prove that the real object of demanding his extradition was to punish him for an offense of a political character, he was not to be surrendered. Punishment, as distinguished from trial, was plainly in the minds

of the framers of this treaty, as evidenced by every part of Article II. Yet no reference to it is made in Article III. If Great Britain were to demand from the United States the extradition of a person on a charge of forgery, burglary, or rape, could such a party demand his discharge from the United States court on a writ of *habeas corpus* or otherwise, by offering to prove or offering proof that the real intent of the British Government was to punish him for a *nonpolitical* offense committed prior to the request for his extradition? It is inconceivable that any other than a negative answer can be made to this question; yet we can not see why a court has not as much right to read this provision into Article III as to read in the word "punished," as it is asked to do by counsel for the respondent.

That the intention of the parties to a treaty must be ascertained by an examination of the entire instrument was held by this court, speaking by Mr. Justice Harlan, in *United States* v. *Texas* (162 U. S., 1).

The same principle has been repeatedly applied by this court to statutes (*Silver* v. *Ladd*, 7 Wallace, 219, 227; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, 22; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S., 613, 635).

In *Pennington* v. *Coxe* (2 Cranch, 33, 59), Chief Justice Marshall used the following language:

> Where the provisions of two acts are so unlike each other, that the comparison

exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say, that the one act exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other.

III.

THE LANGUAGE OF ARTICLE III OF THE TREATY WHEN COMPARED WITH THAT OF PROVISIONS IN OTHER TREATIES OF THE UNITED STATES ADOPTED BOTH PRIOR AND SUBSEQUENT TO THAT OF THE TREATY IN QUESTION PLAINLY SHOWS THAT THE CONSTRUCTION CONTENDED FOR BY THE RESPONDENT IS UNTENABLE.

Under this point attention is respectfully called to the following extradition treaties (each of which is described by its date, page of the Compilation of Treaties in Force, 1904, in which the pertinent provisions will be found), and the number of the article of the treaty, to which attention is invited:

Treaty with Japan, April 29, 1886, article 4, page 472.

Treaty with Netherlands, June 2, 1887, article 3, page 588.

Treaty with Colombia, May 7, 1888, article 5, page 213.

Treaty with Sweden and Norway, January 14, 1893, article 8, page 766.

Treaty with Brazil, May 14, 1897, article 4, subdivisions 1 and 2, page 119.

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Treaty with Mexico, February 22, 1899, article 12, page 548.

Treaty with Peru, November 28, 1899, article 9, page 633.

Treaty with Chili, April 17, 1900, article 7, page 130.

Treaty with Bolivia, April 21, 1900, article 8, page 101.

Treaty with Switzerland, May 14, 1900, article 9, page 776.

Treaty with Servia, October 25, 1901, article 6, subdivision 2, page 701.

Treaty with Belgium, October 26, 1901, article 3, page 83.

Treaty with Denmark, January 6, 1902, article 8, page 245.

Treaty with Guatemala, February 27, 1903, article 3, page 410.

The Compilation of 1904 is so convenient for reference that it is deemed unnecessary to print these various treaty provisions here. As will be observed, three of them antedate the Blaine-Pauncefote Treaty under consideration; the other eleven are subsequent. The provision in the treaty with Japan (Article IV, treaty of April 29, 1886,) is as follows:

> If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offense of a political character, surrender shall not take place; nor shall any person surrendered be tried or punished for any political offense committed previously to his extra-

> dition, or for any offense other than that in respect of which the extradition is granted.

The provision of the treaty with Colombia, May 7, 1888 (Art. V), is in almost identical language.

The provision of the treaty with the Netherlands, June 2, 1887 (Art. IV), is as follows:

> No person shall be tried or punished, after surrender, for any crime or offense other than that for which he was surrendered, if committed previous to his surrender, unless such crime or offense be one of those enumerated in Article II hereof.

In three treaties adopted prior to the one now under consideration, distinct provision has been made in plain and unmistakable language that a person extradited should be neither tried nor punished for an offense other than that for which he was extradited (except that in the case of the treaty with the Netherlands he might be either tried or punished for an offense which was itself made extraditable by the terms of the treaty). In eleven subsequent treaties, extending from that of Sweden and Norway, January 14, 1893, to that of Guatemala, February 27, 1903, similar plain and unmistakable language is used. Our diplomats, as well as those of the various other countries, evidently knew how to use language which would unmistakably forbid the punishment of an extradited criminal for any offense other than that for which he was extradited.

Treaties like statutes are to be considered *in pari materia* when they relate to the same subject, and all these treaties are extradition treaties. Upon what theory can this court be asked to read into Article III of this treaty a word of the greatest importance in changing its sense, which the parties to the treaty have not inserted or in any way implied, when in fourteen other treaties coving a period of seventeen years, and beginning three years before the treaty in question, the treaty framers have found it necessary to expressly use the word which the court is asked to read into a provision of this treaty from which it is expressly omitted?

In the case of *in re Joseph Stupp* (11 Blatchford, 124) Judge Blatchford examined prior and subsequent extradition treaties for the purpose of determining the true construction of the extradition treaty between the United States and Prussia.

IV.

THE FACT THAT AN APPLICATION HAD BEEN MADE BY THE UNITED STATES TO THE CANADIAN GOVERNMENT FOR THE EXTRADITION OF RESPONDENT ON A CHARGE UPON WHICH HE HAD BEEN CONVICTED AND SENTENCED, AND THAT SAID APPLICATION HAD BEEN REFUSED, DOES NOT IN ANY WAY DESTROY THE RIGHT OF THE CIRCUIT COURT OF THE UNITED STATES TO ENFORCE THE EXECUTION OF ITS SENTENCE AFTER THE EXTRADITION OF RESPONDENT ON ANOTHER CHARGE.

This point is referred to, not because of any

special importance attached to it by the Government, but because at previous stages of this controversy great stress has been laid upon it by the counsel for the respondent. Under the terms of this treaty the United States either has or has not the right to punish a person extradited, for a crime or an offense on which he was convicted and upon which he was sentenced before his flight. If it has not that right, of course, the order discharging the respondent was proper and must be affirmed; but if the United States has the right in question, it has always had it and it could not lose it, because, in order to save time and expense, it asked the Canadian government to extradite the respondent for the very offense and conviction under which it now seeks to punish him.

This court can certainly not be asked to hold a proposition so extraordinary as that the Government might have punished Browne for the offense upon which he was convicted and sentenced before his flight to Canada, notwithstanding he was extradited for another and different offense, if it had not applied to the Canadian government for Browne's extradition in the first instance on the charge for which it is now sought to punish him; but that because it made that application and met with a refusal it has lost the right which it would otherwise have had. The rights and obligations of the United States are measured by and defined in the treaty and not by the attitude of the other party to the treaty in dealing with an application

for extradition. The fact that the United States made an application for Browne's extradition on the conspiracy charge is absolutely immaterial to this present controversy. They neither gained nor lost any rights which they had by making that application.

Moreover, it is most respectfully insisted that as to any question of good faith, as distinguished from a question of law, the whole matter is one to be dealt with by the Executive Department of the Government, and one with which the judicial branch is in nowise concerned.

V.

THERE IS NOTHING IN THE DECISION OF THIS COURT IN THE CASE OF UNITED STATES v. RAUSCHER (119 U. S., 407) WHICH PREVENTS THE IMPRISONMENT OF RESPONDENT UNDER THE SENTENCE IMPOSED UPON HIM BEFORE HIS FLIGHT.

The importance of this point lies in the fact that the decision of the court below discharging the respondent from the custody of the warden of Sing Sing Prison was based largely, if not wholly, upon a ruling that the action of the Government was in conflict with the decision of this court in the *Rauscher* case. This seems not only to justify, but require, a careful review of the *Rauscher* decision and a consideration of its bearing on the case at bar.

William Rauscher had been extradited from some place under the dominion of Great Britain on

a charge of having *murdered* a seaman named Jansen on the high seas on board the ship *J. F. Chapman*, of which Rauscher was second mate. He was brought to trial in the Southern District of New York for the crime of *inflicting cruel and unusual punishment* upon Jansen at the same time and place, the offenses of murder and inflicting cruel and unusual punishment on the high seas being provided for, respectively, in sections 5339 and 5347 of the Revised Statutes of the United States. He was convicted of the lesser crime, and on a motion in arrest of judgment raised the question that he could not be tried for any offense other than that for which he had been extradited. The point thus raised was brought to this court by a certificate of division of opinion between the judges of the United States Circuit Court for the Southern District of New York. The crime had been committed in 1884, at which time the only applicable extradition agreement between the United States and Great Britain was the tenth section of the Ashburton Treaty of 1842. The decision of this court was announced on the 6th of December, 1886, and sustained Rauscher's contention as to the true meaning and effect of the provision of the Ashburton Treaty. The opinion of the court was announced by Mr. Justice Miller; Mr. Justice Gray concurred in the decision on one ground, but expressed no opinion as to other points involved in the decision, and Chief Justice Waite dissented.

The opinion of the court quoted from various

authorities to show that the better and prevailing opinion among publicists and writers on international law was that a person could be tried after extradition only for the offense for which he had been extradited. It also reviewed the judicial decisions made in this country which were found to be conflicting. It predicated its decision that Rauscher could not be legally tried for any offense other than that for which he had been extradited, on the three following grounds:

First. That the enumeration in section 10 of the Ashburton Treaty of certain offenses for which parties could by one of the contracting parties be delivered up to justice in the courts of the other contracting party, forbade the inference that the party might be tried for any other offense than that for which he had been extradited, in accordance with the legal maxim *expressio unius est exclusio alterius.*

Second. That the requirement in the treaty that evidence must be offered to the surrendering country making out a *prima facie* case of the commission of the crime for which extradition was demanded, was inconsistent with the claim that the party could, after extradition, be tried for any other offense.

Third. That sections 5272 and 5275 amounted to a Congressional construction of the purpose and meaning of extradition treaties, such as the one under consideration, and whether it were or not it was conclusive upon the judiciary of the right

conferred upon persons brought from a foreign country into this under such proceedings.

The two sections of the Revised Statutes referred to in the opinion are as follows:

> SEC. 5272. It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape.
>
> SEC. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against

> lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

The fact should not be lost sight of that before the rendition of this decision the Government of the United States, through its State Department, had consistently and stoutly resisted the claim of the British Government that a person extradited for one offense could not be tried for another. This difference of opinion is alluded to in the *Rauscher* decision, and is set forth at length in Moore on Extradition, pp. 196–219.

It should also be noted that the *Rauscher* case involved no question of *punishing* an extradited person for an offense (other than the one for which he was extradited) upon a conviction and sentence before his flight. Rauscher had not been punished under any previous conviction, but had been tried for a different offense from that on which he was surrendered.

We are now brought to a consideration of how far the decision in the *Rauscher* case is applicable to the question arising in the case at bar.

In the *Rauscher* case this court was dealing with a provision of a treaty which was entirely silent upon the question of the right of the demanding country to try the accused for any offense other than that which had formed the subject of the proceedings in the surrendering country. In this case we are dealing with a treaty which is not silent on this subject, which was made three years after this court's decision in the *Rauscher* case, and it is certainly not an unreasonable contention that the terms of the new treaty were prepared in the light of, and with a view to, the *Rauscher* decision, and to express the intentions of the contracting parties as to the subject which had been treated of in that decision. Treaties and statutes are constantly being adopted or enacted with a view to meeting conditions created by prior decisions of the courts. Sometimes they are made to accord with the decisions of the courts as to prior treaties or statutes, and sometimes the decisions that courts have been constrained to make, as to the construction of treaties or statutes, are not such as embody the wishes of legislators or nations, and new treaties or statutes are made to express an intention contrary to that which the court has been bound to assume as to prior acts.

The proposition for which we are contending is that in 1889 the parties to this contract or treaty (Great Britain and the United States) covered the point which had formed the general subject-

matter of the *Rauscher* decision, and expressed their meaning and intention about it in plain, unequivocal, and unambiguous language, and that, so far as that language is inconsistent with the view laid down as to the Ashburton Treaty in the *Rauscher* decision, *the language of the treaty, and not the decision of the court as to the construction of a prior treaty, is to govern.* Any parties, whether individuals, corporations, or sovereign nations, have a right to make such contracts as they please, and when these come before the courts for judicial construction, the construction given by the court to a prior contract between the parties is not to be applied to the new contract, if such action will contravene the plain language of the parties.

As has been already pointed out, the first ground upon which this court predicated its construction of the Ashburton Treaty was that the enumeration of certain offenses forbids the inference that parties might be tried or convicted for any others for extradition. We invoke this same principle, as applied to the new treaty, and we say that when Article III of that treaty forbids the trial of a party for an offense different from that for which he was extradited, and is silent on the subject of whether he may be punished for it, to hold that punishment was forbidden equally with trial, would be a violation of the maxim *expressio unius est exclusio alterius*, and we insist that this is especially so when another section of the same treaty forbids both trial and punishment as to another class of offenses.

As to the second ground upon which the decision in the *Rauscher* case was based, that the provisions of a treaty calling for the submission of evidence to the surrendering country, such as will make out a *prima facie* case of guilt, are inconsistent with the theory that the party may, after extradition, be tried in the demanding country for another and different offense, we admit that such an inference might be made as to the present treaty were it not for the express language used in Article III. We insist that this language forbids the inference that might otherwise be made. The language used by contracting parties as to one part of the subject-matter of a contract may, in the absence of any other light on the subject, give rise to an inference as to what they meant with reference to another part of the subject-matter of the contract. But where their meaning and intent as to that other part has been plainly expressed by them, and is inconsistent with the inference that might otherwise be drawn, it is very clear that their plain language must govern.

The third ground on which this court predicated its opinion in the *Rauscher* case was the language of sections 5272 and 5275 of the Revised Statutes. These statutes, incorporated in the revision in 1874, had been enacted originally, section 5273 in August, 1848, and section 5275 in March, 1869. The principle is entirely well settled that where a later statute is inconsistent with the terms of earlier statutes, either in express terms or by necessary

implication, the earlier statutes are *pro tanto* expressly or impliedly repealed, and, of course, within the application of this doctrine a later treaty has at least as great force as a later statute. So that if the terms of treaties adopted after the *Rauscher* decision are inconsistent with the sections of the Revised Statutes, referred to in that decision, they undoubtedly supersede them. No one, for example, would deny that they were *pro tanto* expressly repealed by Articles XII and XIII of the treaty with Mexico of February 22, 1899, already referred to, because those articles provide for the trial of a party for an offense not mentioned in the treaty, with the consent of the surrendering Government, and for the trial of such party for an offense other than that for which he was extradited, if it be one of those named in the treaty, without such consent. And we respectfully insist that in the case of this extradition treaty of 1889 with Great Britain, the intent of the parties, as expressed by the plain language of Articles II and III, amounts to an implied repeal of the sections of the Revised Statutes in question, so far as the same are inconsistent with that plain language.

In short, the position of the Government may be summarized thus: The Ashburton Treaty was entirely silent on the subject of the trial of a person extradited for any other offense than that for which he was surrendered. This left the question whether such action might be taken by either of

the high contracting parties an open question, and it became a question of dispute, the British Government insisting upon one view, and the American Government on another. This court, called upon to construe the meaning of the treaty, held it to mean what the British Government contended, and based its ruling on certain grounds stated and elaborated in the decision. Three years after the decision, the high contracting parties came together and entered into a new treaty. In that new treaty they did not remain silent on the disputed question which had arisen under the old treaty, but they dealt with the question and expressed their intention with regard to it in plain terms. Those terms are free from ambiguity and obscurity, and neither require nor justify judicial construction.

So far as this court had decided what the practice should be as to the trial of persons for crimes other than those for which they have been extradited, the new agreement of the parties carried out the principle laid down by the court. But this court had never decided that a party extradited for one crime might not be punished for another of which he had been convicted before his flight, and the high contracting parties not only did not expressly agree to forbid action of this character, but the language they used most plainly negatives the supposition that they intended to forbid it. And it can not be held that they intended to forbid it, and in effect did forbid it, without disregarding the sound principle of statutory con-

struction on which the very decision of this court which is now invoked by respondent was made chiefly to rest.

Not only would the approval by this court of the contention here made by the respondent, we respectfully contend, violate rules of law and principles of statutory construction, but it would most certainly be inconsistent with sound doctrines of enlightened public policy. We are dealing here, not with a person merely *accused* of crime and clothed by the law with a presumption of innocence, but with a *convicted criminal.* Both the court which tried him, and the appellate court in which his conviction was carefully reviewed, have said that there was no doubt of his guilt. (*U. S.* v. *Browne*, 126 Fed. Rep., 766; *Browne* v. *U. S.*, 145 Fed. Rep., 1.) This court refused on application to grant a writ of certiorari for a review of the case. (*Browne* v. *U. S.*, 200 U. S., 618.) No presumptions are to be indulged in favor of such a criminal. No court will be astute to find doubts in his favor nor seek a construction of statutes or treaties which will enable him to escape the just punishment of his crime. The escape of criminals from merited punishment on barren technicalities or refined subtleties of statutory construction is a crying evil of our criminal jurisprudence. It is not in the interest of either of the great nations which are parties to this compact that their convicted criminals should go

unwhipped of justice. Every leaning of the judicial mind should be toward the punishment and not the liberation of persons who, after fair and careful trial, have been convicted of grave crimes. (*Grin* v. *Shine*, 187 U. S., 181.)

Moreover, every principle of enlightened public policy militates against a construction of a treaty which will paralyze the arm of our own courts and prevent them from enforcing their judicial decrees. The spectacle of a criminal like this respondent going at large on bail, awaiting trial for an offense for which he has been extradited, while the sentence imposed upon him by our courts after trial and conviction of another offense remains unexecuted, is far from edifying. It is not one calculated to deter others from the commission of crime. It is now nearly five years since this respondent was indicted. Every technical subterfuge that could be raised to defer his trial, prevent his conviction, and enable him to escape his punishment has been availed of, and now having fled the country, after his appeals had been exhausted, and having been, after his return, put in prison to serve his sentence, he is asking to have a treaty held to mean what it certainly does not say, so that the sentence imposed upon him may never be executed. We respectfully submit that his claim should never be allowed while the treaty which he invokes admits of any other construction.

The consequences of a decision in favor of the respondent in this case will be far-reaching. In-

stances frequently occur where persons arrested and prosecuted for one offense are discovered, after their arrest, to be the same persons who had been previously convicted of grave crimes and had disappeared. If the treaty between Great Britain and the United States is to receive the construction contended for by respondent, a man surrendered by either country to the other on a charge of larceny or fraud who is discovered after his extradition to have been previously convicted of murder or rape and sentenced to capital punishment or imprisonment for life, will be in a position to demand that he shall have a reasonable time to go back to the country by which he was surrendered before he can be punished for the crime of which he was thus convicted. Surely every consideration of public policy forbids giving to a treaty a construction which may produce such a result when there is any construction which may properly be given which will prevent it.

It is submitted that the order discharging the respondent should be reversed and the circuit court directed to remand him to the custody of the appellant to serve out his sentence.

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HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1907.

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